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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lou Raffour,
Plaintiff in Error.
vs.
United States of America,
Defendant in Error.

BRIEF OF RESPONDENT IN ERROR.

JOSEPH C. BURKE,
United States District Attorney;
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No question whatever is raised on this appeal as to the sufficiency of the evidence to sustain and support the verdict of the jury rendered in this case. The only points presented by the brief of the plaintiff in error consist of the assertion that the trial court committed error in *failing* to give certain instructions, although there were no requests therefore; that certain other instructions constitute an erroneous statement of the law; and that this court will review the alleged errors although no exceptions were taken or reserved at the trial.

I.

The first point presented was that the trial court committed reversible error in failing to instruct the jury on the law concerning the presumption of innocence even without a request therefor.

In support of this contention the plaintiff in error cites the case of Coffin v. United States, 156 U. S. 432. A careful examination of this decision, however, shows that it does not sustain the point made, for the reason that it appears on page 452 of the opinion that the trial court *requested* and *refused* to give the instruction there set out covering the law as to the presumption of the defendant's innocence of the crime charged.

The court states the proposition before it on page 457 as follows:

"This presents the question whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt, so entirely embodies the statement of presumption of innocence *as to justify the court in refusing, when requested,* to inform the jury concerning the latter." (Italics ours.)

There is no intimation in this that it would constitute error on the part of the trial court in failing to give this instruction although no request is made therefor. Nor has our attention been called to any case so holding. On the contrary:

> "It is no ground for reversal that the court omitted to give any particular instructions, where they were not requested by the defendant."

Humes v. U. S., 170 U. S. 210-211;
Isaacs v. U. S., 159 U. S. 487-491;
Ripper v. U. S., 179 Fed. 498;
Sprinkle v. U. S. 141 Fed. 820;
Goldsby v. U. S., 160 U. S. 70-77;
Hughes v. U. S., 231 Fed. 53;
Schultz v. U. S., 200 Fed 239;
16 Corpus Juris, 1056, Sec. 2498.

"Nor are instructions which were given but not excepted to subject to review."

Humes v. U. S., 170 U. S. 210-212;
Tucker v. U. S., 151 U. S. 164;
St. Clair v. U. S., 154 U. S. 134-153.

"It is not necessary for the court in its instructions to define or explain the words 'reasonable doubt,' and, at least in the absence of a request by the defense, a failure to define reasonable doubt is not error"

12 Cyc. 623;
16 Corpus Juris, 1057, Sec. 2498;
People v. Christensen, 85 Cal. 568-571;
People v. Gray, 66 Cal. 271-277;
People v. Hawn, 44 Cal. 96;
People v. Ah Wee, 48 Cal. 236;
U. S. v. Monongahela Bridge Co., 160 Fed. 712.

II.

The plaintiff in error asserts that the trial court did not properly instruct the jury as to what con-

stitutes a nuisance under section 21 of the National Prohibition Act.

There is no merit in this contention whatever. The transcript shows on page 32 that the court read to the jury the definition of a nuisance from section 21 of the National Prohibition Act.

That part of the court's instruction quoted on page 5 of the plaintiff's brief is merely the court's application of the definition to the undisputed facts of the case. The plaintiff would seem to predicate error on the omission of the court to point out that "if the place were his residence, it would not be a common nuisance to keep intoxicating liquor * * * 'for beverage purposes.'" The answer to this is that we are not dealing with a situation where intoxicating liquor was kept in a dwelling or residence.

The case of United States v. One Cadillac Touring Car, 274 Fed. 470, is not an authority on any question raised on this record.

III.

The third instruction complained against is that the instruction reading:

"The government permits the use of certain intoxicating liquors to be mixed with cordials, but the alcoholic content is kept below one-half of one per cent, and these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down."

"is pregnant with insinuation of the guilt of the defendant."

This contention is without merit, and requires no argument to refute it, as there was no evidence offered whatever that the defendant had ever applied for any such permit.

The trial judge in the above-quoted part of his charge was merely explaining and elucidating section 69 of the Federal Prohibition Commissioner's Regulations adopted January 16th, 1920, which he had just finished reading. This and other sections read govern the issuance of permits to retail druggists, pharmacists, etc. He prefaces the whole of the foregoing statement by the words, "That is to say * * *." and the words of the charge that "these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down" are entirely impersonal in their character and cannot be said to reflect against or prejudice this particular defendant in any way. To contend seriously that this language "might well be construed by a jury that in the opinion of the court the defendant was guilty" is to hold the intelligence of the men who sat in the jury box on this trial in low esteem. The contention is wholly without merit.

IV.

The fourth point presented is that the instruction reading:

"The burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired possessed and used"

should have been stated in other language; that it should have been worded to say:

"That when the court instructs that the burden of proof is on the defendant, it means that the evidence must be sufficient to raise a reasonable doubt of the defendant's guilt."

In advancing this point the plaintiff's attorneys have manifestly overlooked the plain provisions of section 33 of title II, which was read in full to the jury as a part of the court's instruction [Tr. p. 31]; to the effect that proof of the possession of intoxicating liquors in any other place than a private dwelling constitutes a *prima facie* case of a violation of the terms of the act; that if the defendant should contend that his possession is lawful under some one of the regulations and provisions of the act, he then has the burden of proving it.

V.

While readily admitting that no requests were made for any instructions, and no exceptions taken or reserved to any part of the court's charge, the plaintiff in error invokes the rule announced in Crawford v. U. S., 212 U. S. 183-194, that,

> "In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception."

But the answer to this is, as we have heretofore pointed out, that under the law laid down by the adjudged cases, no errors have been shown on this record; besides, the case presented does not require the exercise of this extraordinary authority. The record shows that undisputed evidence clearly indicates the defendant's guilt of all the charges contained in the information, and that the plaintiff in error had a fair and impartial trial in every respect.

We therefore ask that the judgment be affirmed.

Respectfully submitted,

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